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Tan Heng Chew & Ors v Tan Kim Hor & Ors

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FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NO 02–7 OF 2005 (W)
SITI NORMA YAAKOB CJ (MALAYA), STEVE SHIM CJ (SABAH & SARAWAK) AND ABDUL HAMID MOHAMAD FCJ
23 JUNE 2006

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Civil Procedure — Appeal — Issue not raised in High Court — New case and new test introduced at Federal Court which was not argued in court below — Whether appellants were only citing new authority which they had failed to cite in the earlier proceedings — Whether Federal Court should determine the right test to be applied

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Civil Procedure — Appeal — New point raised on appeal — New case and new test introduced at Federal Court which was not argued in court below — Whether appellants were only citing new authority which they had failed to cite in the earlier proceedings — Whether Federal Court should determine the right test to be applied

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The respondents had filed a winding up petition in the High Court to wind up Tan Chong Consolidated Sdn Bhd ('TCC'), the ninth appellant. The appellants, who were the respondents in the petition, then filed a notice of motion in that petition for an order to restrain the legal firm of Shearn Delamore & Co ('Shearn') from acting for the petitioners/respondents. The appellants sought to disqualify the respondents from retaining Shearn on the ground that Shearn had over the years acted as common solicitors for the appellants and the respondents.

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The High Court dismissed the application. The appeal to the Court of Appeal was also dismissed. This court granted leave to appeal on the following question: 'What is the proper test to be applied in determining whether a firm of solicitors should be disqualified from representing parties in subsequent litigation'.

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Learned counsel for the respondents raised a preliminary objection that the appeal, as it is now, was not based on a cause or matter raised in the Court of Appeal or in the High Court. He argued that the appellants' case in the High Court and in the Court of Appeal was that:

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(a) Shearn was in possession of confidential information;

(b) The applicable legal principles were as set out in *Prince Jefri Bolkiah v KPMG (a firm)* [1999] 1 All ER 517;

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(c) Shearn should therefore be restrained from acting for the respondents/petitioners in the winding up petition.

As a result, the High Court had made a finding of fact that Shearn was not in possession of any confidential information.

Learned counsel for the respondents argued that the appellants had now taken a completely new stand, based on a 'new case' altogether. The appellants were now

seeking to argue their appeal on a new ground which was never raised in the Court of Appeal and the High Court, ie that the House of Lords' decision in *Prince Jefri Bolkiah* was no longer good law contrary to the crux of the appellants' submission that the applicable common law principles were that of *Prince Jefri Bolkiah*'s case, and therefore this court should instead follow the test laid down in *Spincode Pty Ltd v Look Software Pty Ltd & Ors* [2001] 4 VR 501.

Learned counsel for the appellants replied that the appellants were only citing a new authority which they had failed to cite in the earlier proceedings.

Held, dismissing the appeal:

(1) The proposed test by the respondents at this court had not been argued and considered in the courts below. The findings of facts made by the High Court and confirmed by the Court of Appeal would be rendered superfluous and irrelevant. The respondents now have a new case to meet. For this court to answer the question to be determined as per the proposed test would require this court to assume that the facts required for the application of the proposed test were proved, which were not. The truth was that both the High Court and the Court of Appeal had not addressed their minds to the issue. So, the consideration of what the 'the proper test' should be, was academic. Neither could this court say that the learned judge had committed an error of law by not applying the proposed test because 'the proposed test' was not the law of this country and was not even canvassed before him. The law is the Legal Profession (Practice and Etiquette) Rules 1978 ('LP (P&E) R 1978') which was applied by the learned judge (see para 11).

(2) It was also not correct for the learned counsel for the appellants to say that the appellants had not abandoned their old grounds but are only citing a new authority. The basis of the earlier argument was that confidential information had passed. The basis of the new argument was that it does not matter whether confidential information had passed or not. It was not just a matter of citing another case to support the application of the earlier test as had been argued in the courts below. The appellants had in fact abandoned the 'old test' and were urging the court to accept a completely new test (see para 12).

(3) Having now the benefit of full arguments and more time to ponder, this court should not have granted leave to appeal. However, leave having been granted, the issue was whether this court should now answer the question, in the circumstances mentioned above. This court should not do so (see para 13). This was also not a proper case for the court to examine whether the law applicable in other jurisdictions should be applied in this country (see para 14).

(4) This judgment was not on the ground that the appeal fell outside the provisions of s 96(a) of the Courts of Judicature Act 1964. On the other hand, it was on the ground that the appeal had taken a new turn completely and to answer the question posed (which issue was never canvassed in the courts below) would be a pure academic exercise which required this court to assume that the facts required to answer the question had been proved, when the

courts below had not even addressed their minds to them. Neither should this court assume that they had been proved (see para 15).

[Bahasa Malaysia summary

Responden telah memfailkan satu petisyen penggulungan di Mahkamah Tinggi untuk menggulung Tan Chong Consolidated Sdn Bhd ('TCC'), perayu kesembilan. Perayu-perayu, yang merupakan responden-responden dalam petisyen, kemudian memfailkan satu notis usul di mana petisyen untuk satu perintah menyekat firma guaman Shearn Delamore & Co ('Shearn') daripada bertindak bagi pihak pempetisyen- pempetisyen/responden-responden. Perayu-perayu memohon untuk melucutkan responden-responden daripada mengekalkan Shearn atas alasan bahawa Shearn sejak bertahun lamanya bertindak sebagai peguambela biasa untuk perayu-perayu dan responden-responden.

Mahkamah Tinggi menolak permohonan tersebut. Rayuan ke Mahkamah Rayuan juga ditolak. Mahkamah ini membenarkan rayuan berhubung persoalan-persoalan berikut: 'What is the proper test to be applied in determining whether a firm of solicitors should be disqualified from representing parties in subsequent litigation'.

Peguam yang bijaksana bagi pihak responden-responden menimbulkan satu bantahan awal bahawa rayuan tersebut, seperti sekarang ini tidak berdasarkan kausa atau perkara yang ditimbulkan di Mahkamah Rayuan atau di Mahkamah Tinggi. Beliau berhujah bahawa kes perayu-perayu di Mahkamah Tinggi dan di Mahkamah Rayuan adalah bahawa:

(a) Shearn memiliki maklumat rahsia;

(b) prinsip-prinsip sah yang terpakai senyatakan dalam *Prince Jefri Bolkiah v KPMG (a firm)* [1999] 1 All ER 517;

(c) Shearn dengan itu patut dihalang daripada bertindak bagi pihak responden-repsonden/pempetisyen-pempetisyen dalam petisyen penggulungan itu.

Oleh demikian, Mahkamah Tinggi telah membuat penemuan fakta bahawa Shearn tidak memiliki apa-apa maklumat rahsia.

Peguam yang bijaksana bagi pihak-pihak responden berhujah bahawa perayu-perayu sekarang membuat pendirian baru, berdasarkan satu 'new case'. Perayu-perayu sekarang memohon untuk menghujahkan rayuan mereka atas alasan baru yang tidak pernah timbul dalam Mahkamah Rayuan dan Mahkamah Tinggi, iaitu bahawa keputusan House of Lords dalam *Prince Jefri Bolkiah* bukan lagi undang-undang yang boleh dipakai bertentangan dengan intipati hujah perayu-perayu bahawa prinsip-prinsip common law adalah terpakai dalam kes *Prince Jefri Bolkiah*, dan oleh itu mahkamah ini sepatutnya mengikuti ujian yang dinyatakan dalam *Spincode Pty Ltd v Look Software Pty Ltd & Ors* [2001] 4 VR 501.

Peguam bijaksana bagi pihak perayu-perayu menjawab bahawa perayu-perayu hanya memetik autoriti baru yang mereka telah gagal berbuat demikian dalam prosiding sebelumnya.

Diputuskan, menolak rayuan tersebut:

(1) Ujian yang dicadangkan oleh responden-responden di mahkamah ini tidak boleh dihujahkan dan dipertimbangkan di mahkamah bawahan. Penemuan fakta-fakta yang dibuat oleh Mahkamah Tinggi dan disahkan oleh Mahkamah Rayuan akan menjadi terlalu banyak tidak relevan. Responden-responden kini mempunyai kes baru untuk dibuktikan. Untuk mahkamah ini menjawab persoalan yang perlu ditentukan seperti ujian yang dicadangkan memerlukan mahkamah ini mengandaikan bahawa fakta-fakta tersebut menghendaki permohonan ujian yang dicadangkan tersebut dibuktikan, yang tidak berlaku di sini. Hakikatnya adalah bahawa kedua-dua Mahkamah Tinggi dan Mahkamah Rayuan tidak mengutarakan minda mereka kepada persoalan tersebut. Oleh itu, pertimbangan berhubung apa 'the proper test' sebenarnya, adalah akademik. Begitupun mahkamah ini juga boleh mengatakan bahawa hakim yang bijaksana telah terkhilaf dari segi undang-undang apabila tidak menggunakan ujian yang dicadangkan kerana 'the proper test' bukan undang-undang negara ini dan tidak dikemukakan di hadapannya. Undang-undang yang digunakan oleh hakim yang bijaksana adalah Kaedah-Kaedah Profesyen Undang-Undang (Amalan dan Etika) 1978 ('KKPUU (A&E) 1978') (lihat perenggan 11).

(2) Ia juga tidak betul untuk peguam yang bijaksana bagi pihak perayu-perayu mengatakan bahawa perayu-perayu tidak meninggalkan alasan lama mereka tetapi hanya memetik autoriti baru, Asas hujah sebelumnya adalah bahawa maklumat rahsia telah didedahkan. Asas hujah baru adalah bahawa ia tidak kira sama ada maklumat rahsia telah didedahkan atau tidak. Ia bukan sahaja perkara memetik kes lain untuk menyokong permohonan ujian terdahulu seperti yang dihujahkan di mahkamah bawahan. Perayu-perayu pada hakikatnya telah meninggalkan 'old test' dan mendesak mahkamah untuk menerima ujian baru (lihat perenggan 12).

(3) Setelah mendapat manfaat keseluruhan hujah dan lebih masa untuk berfikir, mahkamah ini tidak sepatutnya memberikan kebenaran untuk mengemukakan rayuan. Namun, kebenaran telah diberikan, isunya adalah sama ada mahkamah ini sekarang patut menjawab persoalan tersebut, dalam keadaan yang dinyatakan di atas. Mahkamah ini tidak patut berbuat demikian (lihat perenggan 13). Ini juga bukan satu kes yang sesuai untuk mahkamah memeriksa sama ada undang-undang yang terpakai dalam bidang kuasa lain patut digunakan dalam negara ini (lihat perenggan 14).

(4) Penghakiman ini bukan atas alasan bahawa rayuan tersebut tidak terangkum peruntukan s 96(a) Akta Mahkamah Kehakiman 1964. Sebaliknya, berdasarkan alasan tersebut rayuan itu terdapat pembaharuan dan untuk menjawab persoalan yang dikemukakan (yang mana persoalan itu tidak pernah dikemukakan di mahkamah bawahan) adalah satu latihan akademik semata-mata yang menghendaki mahkamah ini mengandaikan bahawa fakta-fakta yang dikehendaki untuk menjawab persoalan itu dibuktikan, apabila mahkamah bawahan tidak mengarah minda mereka kepadanya. Begitu juga mahkamah ini boleh mengandaikan bahawa ia telah dibuktikan (lihat perenggan 15).]

Notes

For a case on an issue not raised in High Court, see 2 *Mallal's Digest* (4th Ed) Consolidated Subject Index para 974.

For cases on new point raised on appeal, see 2 *Mallal's Digest* (4th Ed) Consolidated Subject Index paras 1083–1085..

Cases referred to

Prince Jefri Bolkiah v KPMG (a firm) [1999] 1 All ER 517 (refd)

Raphael Pura v Insas Bhd & Anor [2003] 1 MLJ 513 (refd)

Spincode Pty Ltd v Look Software Pty Ltd & Ors (2001) 4 VR 501 (refd)

Legislation referred to

Civil Law Act 1956
Courts of Judicature Act 1964 s 96(a)
Legal Profession Act 1976
Legal Profession (Practice and Etiquette) Rules 1978 rr 3 and 5

Lim Kian Leong (Sia Siew Mun, Wong Yoke Peng, Tan Shin Shin and Rohana bte Ngah with him) (Lim Kian Leong & Co) for the appellants.

Dato' Cecil Abraham (Dato' Shafee Abdullah, Yee Mei Ken and Sunil Abraham with him) (Shearn Delamore & Co) for the respondents.

Abdul Hamid Mohamad FCJ:

[1] The respondents herein had filed a winding up petition in the High Court to wind up Tan Chong Consolidated Sdn Bhd ('TCC'), the ninth appellant on the just and equitable grounds. The appellants herein are the respondents in the petition. The appellants then filed a notice of motion in that petition for an order to restrain the legal firm of Shearn Delamore & Co ('Shearn') from acting for the petitioners/respondents.

[2] The grounds forwarded by the appellants to disqualify the respondents from retaining Shearn are that Shearn had over the years acted as common solicitors for the appellants and the respondents. In the course of so acting, Shearn had advised on at least three corporate exercises involving reductions and restructuring of capital in which Shearn had prepared affidavits and company returns stating the respective shareholdings of the parties in TCC. From 1998 to 2000, Shearn was advising as common solicitors for the parties including TCC in respect of a de-merger exercise for Tan Chong Motor Holdings Bhd ('TCMH') in which TCC had approximately 44% of the shares. Shearn was also the common solicitor at the time of the Emergency General Meeting on 11 September 1999 when the shareholders of TCC voted to approve TCC's participation in the de-merger exercise.

[3] The High Court dismissed the application. The appeal to the Court of Appeal was also dismissed. On 17 May 2005, this court granted leave to appeal on the following question:

What is the proper test to be applied in determining whether a firm of solicitors should be disqualified from representing parties in subsequent litigation. A

[4] Before us, Dato' Cecil Abraham, learned counsel for the respondents raised a preliminary objection. His objection was that the appeal, as it is now, is not based on a cause or matter raised in the Court of Appeal or in the High Court. He argued that the appellants' case in the High Court and in the Court of Appeal was that: B

(a) Shearn was in possession of confidential information

(b) The applicable legal principles are as set out in *Prince Jefri Bolkiah v KPMG (a firm)* [1999] 1 All ER 517.

C

(c) Shearn should therefore be restrained from acting for the respondents/ petitioners in the winding up petition.

[5] As a result the High Court had made a finding of fact that Shearn was not in possession of any confidential information. The judgment of the High Court reads: D

I am satisfied that the Firm is not in possession of any information, confidential or otherwise, as alleged by the respondents, which the Firm is capable of using against the respondents (the appellants herein — my addition) in this petition. The respondents' only complaint is that the Firm's corporate department had previously advised TCC in certain corporate matters and in its participation of the de-merger exercise of TCMH, I am of the view that the respondents' assumptions of any conflict of interest and confidentiality are seriously misconceived. These allegations are far-fetched and have been credibly responded to by the petitioners. The partners of the corporate department in the Firm have confirmed that during their retainer by TCC, neither the petitioners nor the respondents had confided information, confidential or otherwise, to the Firm which are relevant or material to this petition. Their scope of advice to TCC was confined to the company only and not to the individual shareholders. E F

It is specifically noted that the Firm is not privy to information of the respondents or their personal business affairs, which are relevant or material to this petition or which can be used against the respondents in this litigation. More importantly, there is no evidence in support of the respondents' bare allegation that the Firm may be in possession of confidential information which can be used against them in this petition. I am of the view that the Court cannot and will not grant an injunction based on bare allegations or assumptions of the respondents. And it must be highlighted that this family winding up petition does not deal with the merits or demerits of the de-merger exercise of TCMH, which had been concluded and implemented. There is no risk, real or otherwise, that the Firm will disclose any confidential information as alleged by the respondents because there is no such information. On this ground alone, which forms the substratum of the application, this application should be dismissed with cost. G H

[6] The Court of Appeal confirmed that finding of fact. The judgment of the Court of Appeal on the issue reads: I

9. In the appeal, the appellants failed to show that the learned judge erred in coming to that finding. In paragraph (iv) on page 7 of the appellants' counsel's written submission it was said that the fact of the Firm's having confidential information might be readily inferred not only from the documents passed to the Firm but also from 'oral discussions', and there then followed, as if in illustration or support of the argument,

A a reference to certain exhibited documents which were said to indicate that inconsistent opinions had been rendered by the Firm to 'TCMH/Warisan' and the fourth petitioner, but it was not shown how the rendering of opinion by the Firm meant the receipt of confidential information by them. In paragraph 3 on page 11 of the said written submission a reference was made to a paragraph on page 6 of the learned judge's judgment in which he spoke about the separation in the Firm between the corporate B department and the litigation department. It was said that the learned judge erred in being satisfied that such a separation of separateness was sufficient to ensure that confidential information received by the corporate department would not be known to the litigation department and misused. But in the passage that I have quoted it is obvious that it was not the finding of the judge that the Firm's corporate department C did receive confidential information but there was no danger of its being passed to the litigation department which would be handling the petition. It is obvious that what the judge found was that the Firm, whether its corporate department or litigation department, was not in possession of any confidential information. As I said it was not shown in the appeal that the judge erred in that finding and therefore I had to accept that finding as correct. That finding justified the dismissal of the application and for that reason I decided that the appeal should be dismissed. D

[7] Learned counsel for the respondents argued that the appellants have now taken a completely new stand. Their appeal is now based on a 'new case' altogether. The appellants are now seeking to argue their appeal on a new ground which was E never raised in the Court of Appeal and the High Court. Now the appellants are saying that Shearn need not be in possession of confidential information contrary to their principal contention that confidential information was passed to Shearn. Learned counsel for the respondents argued that the appellants are now saying that the House of Lords' decision in *Prince Jefri Bolkiah* is no longer good law contrary to the crux of the appellants' submission that the applicable common law principles F are that of *Prince Jefri Bolkiah*'s case. The appellants now argue that this court should instead follow the test laid down in *Spincode Pty Ltd v Look Software Pty Ltd & Ors* (2001) 4 VR 501 by the Court of Appeal in the State of Victoria, Australia. This was not the appellants' case in the Court of Appeal.

G **[8]** Learned counsel for the appellants replied that the appellants were only citing a new authority which they had failed to cite in the earlier proceedings. They had not abandoned their old ground. The question is what is the test that should be applied.

[9] On the date of the hearing, we declined to make a ruling as we thought that H we would get a better picture after hearing the appeal. What more, this court had heard the arguments during the hearing of the leave application and had granted leave. However, whether or not we would answer the question, after hearing the full appeal, is another matter.

I **[10]** Reading the appeal records, it is true that both parties had relied on *Prince Jeffri Bolkiah*'s case. However, the learned judge did not even refer to the case. Instead, he referred to rr 3 and 5 of the Legal Profession (Practice and Etiquette) Rules 1978 ('LP (P&E) R 1978') which make reference to 'possession of confidential information'. It may well be that the learned judge had both the case and the rules in mind.

[11] The Court of Appeal did not refer to any decided case. It dealt with only one issue: whether the appellants had shown that the learned judge had erred in his findings of facts. The Court of Appeal held that the appellants had failed to do so. Before us, the said findings of facts are not challenged. But, the appellants now argue that, whether or not Shearn had the confidential information is not relevant. The test applied by the House of Lords in *Prince Jeffri Bolkiah*'s case should not be followed. Instead a wider test applied by the courts in New Zealand, Canada and Australia should be followed. The appellants even proposed the test as follows:

> The proper test is:
>
> Where:
>
> (1) A solicitor (or a solicitor's firm) has advised a former client on a matter (or a matter related or connected to such matter) which on the facts is or may reasonably be expected to be relevant to a subsequent case; or
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> (2) It is in the interests of justice: The solicitor (and the solicitor's firm) shall not act in such subsequent case nor in any way adverse to the interests of the former client in relation to the matter and as may be further ordered by court.

[12] I am now able to appreciate the respondents' complaints better. The proposed test had not been argued and considered in the courts below. The findings of facts made by the High Court and confirmed by the Court of Appeal would be rendered superfluous and irrelevant. The respondents now have a new case to meet. Had the proposed test been argued and accepted by the High Court, we do not know what the learned judge's findings of facts relevant to the test and what his decision would have been. For example, quoting from the wording of para (1) of the proposed test, whether Shearn had advised 'a former client *on a matter (or a matter related or connected to such matter) which on the facts is or may reasonably be expected to be relevant to a subsequent case …*'. (Emphasis added.) This require findings of facts. For this court to answer the question as per the proposed test would require this court to assume that the facts required for the application of the proposed test are proved. The truth is that both the High Court and the Court of Appeal had not addressed their minds to the issue. Neither should this court assume that they have been proved. So, the consideration of what the 'the proper test' should be, is academic. It is trite law that this court should avoid answering academic questions — *Raphael Pura v Insas Bhd & Anor* [2003] 1 MLJ 513. Neither can we say that the learned judge had committed an error of law by not applying the proposed test because 'the proposed test' is not the law of this country and was not even canvassed before him. The law is the LP (P&E) R 1978 which was applied by the learned judge. Similarly, we do not know the views of the Court of Appeal on the proposed test.

[13] It is also not correct for the learned counsel for the appellants to say that the appellants had not abandoned their old grounds but are only citing a new authority. The basis of the earlier argument was that confidential information had passed. The basis of the new argument is that it does not matter whether confidential information had passed or not. It is not just a matter of citing another case to support

A the application of the earlier test as had been argued in the courts below. The truth is that the appellants had now abandoned the 'old test' and are urging the court to accept a completely new test.

[14] Having now the benefit of full arguments and more time to ponder, I am now
B of the view that this court (in which I was a member) should not have granted leave to appeal. However, leave having been granted, the issue is whether this court should now answer the question, in the circumstances mentioned above. I am of the view that this court should not do so.

[15] I have given serious thought whether, I should nevertheless consider the
C question and give an answer to it. I think I should not. Otherwise, I would be making assumptions of what the learned High Court and Court of Appeal judges would have decided, on facts and law. Even 'the law' that is said to lay down the new test are, in fact, judgments in other jurisdictions with their own statutory provisions and rules. We have our own statutory provisions peculiar to us in the Legal Profession Act 1976
D and the LP (P&E) R 1978 as well as the Civil Law Act 1956. I do not think that this is a proper case for the court to examine whether the law applicable in other jurisdictions but not in others should be applied in this country.

[16] Lastly, I would like to clarify that this judgment is not on the ground that the
E appeal falls outside the provisions of s 96(a) for the Courts of Judicature Act 1964. On the other hand, it is on the ground that the appeal has taken a new turn completely and to answer the question posed (which issue was never canvassed in the courts below) would be a pure academic exercise which requires this court to assume that the facts required to answer the question had been proved, when the courts below had not even addressed their minds to them. Neither should this court assume
F that they had been proved.

[17] I would therefore dismiss the appeal with costs and order that the deposit be paid to the respondents to account of their taxed costs.

G **[18]** The learned CJ (Malaya) and the learned CJ (Sabah and Sarawak) had read this judgment in draft and had expressed their agreement with it.

Appeal dismissed with costs.

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Reported by Loo Lai Mee

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